

# Supporting Self-Represented Litigants and Access to Justice

## How Does ODR Fit In?

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### Abstract

*In 2015 the Conference of Chief Justices and the Conference of State Court Administrators (CCJ/COSCA), representing the leadership of the state court systems of the United States, adopted the following goal for access to justice for civil legal issues.*

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*How far are we from attaining that goal today?*

**Keywords:** ODR, self-represented litigants, access to justice, legal services.

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How far are we from attaining that goal today? It is useful to look at the issue from at least two perspectives – the prevalence of self-represented litigants in the courts and the overall ‘justice gap’.

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1 2015 Resolution 5, *Reaffirming the Commitment to Meaningful Access to Justice for All*, available on [ncsc.org](http://ncsc.org).

2 2015 Resolution 5, *Reaffirming the Commitment to Meaningful Access to Justice for All*, available on [ncsc.org](http://ncsc.org).

'Landscape' studies by the National Center for State Courts have found that 76% of civil, non-family cases<sup>3</sup> and 72% of family cases<sup>4</sup> in US courts involve one or more self-represented litigants. The suddenness of the appearance of large numbers of self-represented litigants in our civil courts is revealed by comparing the results of a similar National Center study in 1992; then 95% of cases disposed of in general jurisdiction civil courts involved attorneys on both sides.<sup>5</sup> In the majority of civil cases, the self-represented party is the defendant – facing an attorney on the other side. This is particularly true in debt collection, landlord/tenant and foreclosure cases; the default rate in these matters is 95% or higher in most states. In family law matters two self-represented parties are more likely to appear in a case. The challenge the courts face in dealing with self-represented litigants is to equip them with the information, skills and assistance needed to obtain an outcome that reflects the facts and the law of the matter – in short, to ensure they receive justice.

While the challenge of meeting the needs of such large numbers of self-represented litigants is daunting, the issues presented by the 'justice gap' are even more difficult – the high likelihood that Americans will not know that they have a legal issue, the small likelihood that they will seek legal assistance in any form if they do, and the likelihood that fewer than half of those who seek such assistance will obtain it.

A 2017 report from the Legal Services Corporation concludes that only 14% of low-income Americans get adequate legal help for their civil legal issues.<sup>6</sup> The report found that 71% of low-income Americans have one or more civil legal issues annually; 24% have six or more such issues. Only 20% of them seek legal help for any of these problems; they are more likely to seek help with divorce and other family law matters and wills and probate issues – matters that people recognize as presenting legal issues – and least likely to seek help for problems arising in the areas of health and finance. The civil legal aid programmes of the United States are currently providing adequate assistance to only about half of the eligible persons who seek their help, and for an even smaller proportion of the issues on which aid is sought.

Poor people (those making 125% or less of the Federal Poverty Level) constitute 19% of the population. The middle class makes up an additional 52% of the

3 P. Hannaford-Agor *et al.*, Nat'l Ctr. for State Courts, Civil Justice Initiative: The Landscape of Civil Litigation in State Courts iv (2015). Available at: <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

4 Nat'l Ctr. for State Courts, Inst. for the Advancement of the Am. Legal Sys. & Nat'l Counsel of Juvenile and Family Court Judges, Family Justice Initiative: The Landscape of Domestic Relations Cases in State Courts ii (2018). Available at: <https://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/FJI/FJI%20Landscape%20Report%20mb.ashx>.

5 2015 Resolution 5, at 31.

6 Legal Services Corporation, 'The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans', Prepared by NORC at the University of Chicago for Legal Services Corporation, Washington, DC, 2017.

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population.<sup>7</sup> Research by Rebecca Sandefur interviewed a representative sample of all residents of ‘Central City’, USA, and found a similar pattern across all income levels Americans’ failure to take their legal problems to a lawyer, primarily because they did not recognize their problems as legal in nature.<sup>8</sup> This suggests that the middle class experience is much the same as that of poor Americans. The result is 180 million adult Americans with unmet civil legal needs.

This estimate is confirmed by the American Bar Association’s 2014 World Justice Project Rule of Law Index, which shows the United States rating 65th out of 100 countries for access to and affordability of civil legal services, the lowest ranking among all industrialized nations surveyed.<sup>9</sup>

So the gap between the goal of the CCJ/COSCA and today’s reality is at least 180 million Americans and several times that number of civil legal problems. It is abundantly clear that the American legal profession is failing utterly in meeting the civil legal needs of the population.

## 1 What We Know about Self-Represented Litigants and the Services They Need

The most important thing that we have learned about self-represented litigants (SRLs) is the importance of avoiding stereotyping them. The majority are poor, but many middle class members and persons with advanced degrees represent themselves. Their language and cultural needs vary widely. In courts that accommodate their needs, they understand what is going on.<sup>10</sup> And research in unemployment compensation hearings<sup>11</sup> and the Massachusetts Housing Court<sup>12</sup> has shown that where agencies and courts have procedures designed for persons without lawyers, the randomized assignment of the opportunity for a free lawyer made no difference in case outcomes. In short, they do not have to have a lawyer to obtain a just result.

7 R. Kochhar, ‘The American Middle Class is Stable in Size, But Losing Ground Financially to Upper-Income Families’, Pew Research Center (6 September 2018).

8 R.L. Sandefur, ‘Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study’, 2014. Available at: [www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa\\_aug\\_2014.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf).

9 [https://worldjusticeproject.org/sites/default/files/files/wjp\\_rule\\_of\\_law\\_index\\_2014\\_report.pdf](https://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf).

10 Greacen Associates, LLC., ‘Effectiveness of Courtroom Communications in Hearings Involving Two Self-Represented Litigants (Self-Represented Litigants Network 2008)’. Available at: [https://www.srln.org/system/files/attachments/Effectiveness%20in%20Courtroom%20Communication%20in%20Hearings%20Involving%20Two%20Self-Represented%20Litigants\\_0.pdf](https://www.srln.org/system/files/attachments/Effectiveness%20in%20Courtroom%20Communication%20in%20Hearings%20Involving%20Two%20Self-Represented%20Litigants_0.pdf).

11 D. James Greiner & C.W. Pattanayak, ‘Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?’, *Yale Law Journal*, Vol. 121, 2011, p. 2118.

12 D. James Greiner, C.W. Pattanayak, & J.P. Hennessy, ‘How Effective are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court’, 2012.

On the other hand, research by the Institute for the Advancement of the American Legal System<sup>13</sup> has shown that, without assistance, SRLs

- Do not understand the law, the procedure, the language, the etiquette or the court's expectations of them
- are intimidated by the rules of evidence
- are *very* aware of their shortcomings and
- are anxious and intimidated.

Over the past twenty years, courts – often with the help of legal aid and pro bono attorneys – in many states have created a variety of resources for SRLs; they are frequently accessible in self-help centres in the courthouse or by telephone or another remote communications mechanism.<sup>14</sup> These services include:

- A calming person who can respond to questions
- Plain language forms and document assembly software – like TurboTax – that enables a user to complete the forms by answering questions in an interview
- Process road maps
- Answers to Frequently Asked Questions
- Glossaries of legal terms
- Annotated relevant statutes for specific types of cases or legal issues
- Annotated court rules
- Calculators for child and spousal support when their amount is determined by standard formulas
- Options available to a litigant at a particular stage in a court proceeding
- Common fact patterns/paths and potential downstream consequences
- Triage and referral to unbundled or full representation
- Websites where this information is available and downloadable
- Mediation and settlement assistance

## 2 An Overall Strategy for Addressing the Larger 'Justice Gap'

Largely as a result of the Justice for All (JFA) initiative begun by the Public Welfare Foundation in 2016 in response to the CCJ/COSCA resolution, a general strategy has arisen for addressing the justice gap. The JFA initiative offers a framework based on the premise that the justice system can and should provide a well-integrated and coordinated infrastructure that permits everyone to have effective assistance to resolve their civil legal issues. It should incorporate screening to identify the individual's needs and align them with appropriate resources in a system that provides:

13 N. Knowlton *et al.*, 'Cases Without Counsel (Institute for the Advancement of the American legal System 2016)'. Available at: [https://iaals.du.edu/sites/default/files/documents/publications/cases\\_without\\_counsel\\_research\\_report.pdf](https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf).

14 J. Greacen, 'Serving Self-Represented Litigants Remotely: A Resource Guide (Self Represented Litigation Network 2016)'. Available at: [https://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16\\_0.pdf](https://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16_0.pdf).

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- A network of trusted community intermediaries to help people realize they have a legal problem, support them in accessing information about the problem, assist them in completing forms and understanding options and help them find available resources;
- Widely available and adequate referrals, including enhanced coordination with social services;
- Services such as self-help centres and navigators;
- Access to information through technology, including informational websites, online forms and decision-support tools;
- Simplified court and administrative rules and processes;
- Assistance with mediation, negotiation and other ways to resolve issues outside of the courtroom;
- Legal representation through well-resourced civil legal aid providers, pro bono assistance, discrete task representation, affordable and widely available market-based options and other appropriate services; and
- Social and economic analysis to identify upstream intervention points to prevent an economic, health, education, or social issue from becoming a legal issue.

*In short, this is a system that enables everyone to get access to the information and effective assistance they need – when and where they need it – and in a format they can use.*

In recent years, the process has received significant impetus from the Microsoft Corporation,<sup>15</sup> which committed in 2016 to build a ‘litigant portal’ to specifications developed by Tom Clarke of the National Center for State Courts,<sup>16</sup> based on a recommendation originating in a 2012-13 Summit on the Use of Technology to Enhance Access to Justice sponsored by the Legal Services Corporation.<sup>17</sup> Research on the needs of members of various communities in Alaska and Hawaii – the pilot states for initial implementation of the portal – produced the concept of ‘curated content’ explained below.

The general strategy being implemented in Alaska and Hawaii includes four major components: a ‘legal portal’, ‘trusted intermediaries’, ‘curated content’, and a multitude of resources that enable self-represented persons to handle their legal issues with or without involving lawyers and courts.

- An online ‘legal portal’ will use artificial intelligence and natural language processing to identify the existence of a legal issue from a user’s plain language statement of her or his ‘problem’, using follow-up questions to confirm or disconfirm a diagnosis. Once a legal problem is identified, the portal links

15 Microsoft’s commitment included donation of the software resulting from its efforts to the public domain.

16 T.M. Clarke, ‘Building a Litigant Portal; Business and Technical Requirements, National Center for State Courts 2016’. Available at: <https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/375/>.

17 Report of the Summit on the Use of Technology to Expand Access to Justice (LSC 2013). Available at: <https://www.lsc.gov/media-center/publications/report-summit-use-technology-expand-access-justice>.

the user with the best available resource for help in addressing it. The resource may be an online source of authoritative information, a private or non-profit legal service provider, a court-based programme, a non-legal provider such as a housing programme, a workers' compensation programme, a welfare provider, or a medical provider, a document assembly programme for creation of an appropriate legal letter or form or a text messaging system that provides automated prompts to litigants as their cases progress.<sup>18</sup>

- People who do not realize they have a legal problem are not going to look for a 'legal portal' to help them address it. The general strategy calls for involving 'trusted intermediaries' to use the portal to help people learn that they have a problem and link them to an available resource. Trusted intermediaries are being recruited from the fields of librarians, clergy, bankers, municipal offices, hospital staff, postmasters and postal workers and staff of senior centres and other community support entities.
- Legal information content is being restructured to provide a 'curated experience' to a user – a specific answer to the immediate issue presented by the user rather than a reference to a short treatise on the law in an area, such as 'layman's guide to landlord/tenant law'.
- The resources to which a legal portal can link a user include all of the resources developed by self-help centres to assist SRLs. However, most of these self-help resources assume the use of the court system to resolve legal issues. Additional resources are needed that provide persons with alternative approaches such as demand letters, negotiation, mediation and arbitration that can be pursued with and without the help of a lawyer. Online for-profit services currently offer an alternative route to legal information, forms and advice. A number of states are pursuing revised regulatory structures to enable and encourage such technology-based delivery systems and the development of trained professionals other than lawyers who will be authorized to help people deal with some legal issues in some forums.

### 3 *How Does Online Dispute Resolution (ODR) Fit within Either of These Strategies?*

Although the inspiration for current ODR systems comes from the experience of eBay's online 'out of court' method for resolving disputes arising from online sales conducted through its website, in the United States ODR has been conceived primarily as a means of resolving contested court cases. Consequently, its current use is limited to SRLs and not to the larger 'justice gap' cohort of persons who do not know they have a legal issue or are seeking an affordable way to resolve an issue they have.

ODR's potential advantage for SRLs with civil and family legal cases are that it provides a structured way to reach agreement with the other party to the case that does not require courtroom proceedings. It can be conducted asynchro-

18 See J.M. Greacen, 'Eighteen Ways the Courts Should Use Technology to Better Serve Their Customers (Institute for the Advancement of the American Legal System 2018)'. Available at: [https://iaals.du.edu/sites/default/files/documents/publications/eighteen\\_ways\\_courts\\_should\\_use\\_technology.pdf](https://iaals.du.edu/sites/default/files/documents/publications/eighteen_ways_courts_should_use_technology.pdf).

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nously, increasing its convenience in terms of the time at which a user can prepare and respond to offers and avoid potentially unpleasant face-to-face encounters. But because it is currently offered as a court service for active cases, it requires a user to prepare, file and perfect service of a formal complaint or petition and a summons – and pay a filing fee and the costs of service in order to access it. If the user is the defendant or respondent in the case it requires preparation of, filing and service of an answer or response. If the only service provided is an online negotiating platform, it does not address an SRL's problems of ignorance of the law and the process applicable to the matter when it is pursued as a court case.

One might respond that this is no worse than the current situation in which most debt collection, landlord/tenant, foreclosure and many family law matters are resolved by default. But that is not a sufficient response. Courts should not spend public resources on a new technology that leaves SRLs totally at the mercy of a sophisticated opponent on an uneven playing field. At least when the parties have an opportunity to be in a courtroom, the judge can take steps to ensure that an SRL understands the law and process at least at a rudimentary level and that a represented or knowledgeable party is unable to take unfair advantage of his or her superior bargaining position. Judges' protective instincts are much less likely to come to the forefront in reviewing a proposed order or judgment to which both parties subscribe.

The protective role of the judge in civil cases was emphasized by the Conference of Chief Justices in one of the principles of its Call to Action adopted as the framework for its current Civil Justice Initiative.<sup>19</sup>

### **11.1 Courts should ensure that judgments are consistent with requirements for notice, standing, timeliness and sufficiency of documentation to support the relief sought.**

This principle transforms what have always been considered 'affirmative defences', which are waived unless explicitly raised by the defendant or respondent, into non-delegable affirmative obligations of the judge to investigate and verify.

For a court-connected ODR process to be fair to SRLs it requires a well-crafted educational component that will implement this requirement of the Civil Justice Call to Action. Building that component requires considerable time, thought and resources in building the software platform, taking advantage of the experience and expertise of existing self-help centres.<sup>20</sup>

Basic education could be required as part of any online tool. For example, California requires that parties participating in mandatory mediation receive an ori-

19 Nat'l Ctr. for State Courts & Inst. for the Advancement of the Am. Legal Sys., Call to Action: Achieving Civil Justice for All, Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee (2016). Available at: <https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/NCSC-CJI-Report-Web.ashx>.

20 *Best Practices in Court-Based Programs for the Self-Represented: Concepts, Attributes, Issues for Exploration, Examples, Contacts, and Resources* (SRLN 2008). Available at: <https://www.srln.org/node/29/best-practices-best-practices-court-based-programs-self-represented-concepts-attributes>.

entation beforehand that describes the mediation process and the court's role, information about types of custody arrangements and current research on co-parenting.<sup>21</sup> It further requires that mediation be terminated if the mediator "believes that he or she is unable to achieve a balanced discussion between the parties".<sup>22</sup> This basic education is even more crucial in cases where a litigant is being asked to negotiate with a represented party.

The original Modria products in the Netherlands and British Columbia – Rechtwijzer and MyLawBC – placed great emphasis on just such educational components, and HIIL, Rechtwijzer's sponsor, uses the term 'informational justice' to describe its effort to provide an unrepresented party with sufficient understanding of his or her legal situation to negotiate effectively in an online environment.

For example, MyLawBC – which was originally designed to assist in resolving the issues arising from divorce and does not require the filing of a court action – asks the user for information on the critical issues in a divorce settlement, e.g. whether the couple has children, owns a home, has investments and pension entitlements. It then presents the legal principles that govern decisions about each of these matters. If the parties are not able to reach agreement after having an opportunity to learn about the law applicable to each issue, MyLawBC asks, 'Would you like to know how other people in this situation typically resolve this issue?'

This educational feature is also present in British Columbia's more recent condominium and small claims dispute resolution ODR platforms.<sup>23</sup> It appears to have been taken into account in Clark County, Nevada's ODR process for negotiating parenting agreements in contested custody cases. The application explains each of the issues that a couple has resolved and the basic legal framework applicable to it.

But this does not appear to be the norm for most ODR applications in the United States. I am familiar with the debt collection ODR pilot programme in New Mexico. From my perspective, a debtor needs to be informed about at least the following legal subjects in order to be able to negotiate evenly with a debt collector or its lawyer:

- How to calculate the amount actually owed, including the permissibility of late fees, computation of interest and permissibility and reasonable amounts of attorney's fees
- How to determine whether you paid a previous owner of the debt more than the current owner of the debt acknowledges
- Limitation on permissible interest rates
- The applicable statute of limitations and how it is applied, e.g. from the date of the last payment made on the debt

21 California Rules of Court, Rule 210 e (2).

22 California Rules of Court, Rule 210 e (7).

23 See Civil Resolution Tribunal, available at: <https://civilresolutionbc.ca/>. See also Webinar on CRT presented by Shannon Salter, available at: <https://www.gotostage.com/channel/1f96b13ba2bd4be49e79443719959816/recording/66555ada797544a793846a2b8b59c126/watch>.



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- How to examine the chain of ownership that establishes the standing of a debt buyer to enforce the original loan agreement
- Adequacy of notice and service of the debt collection complaint
- Rules concerning auto repossession and deficiency assessments
- Statutory exemptions from garnishment and attachment
- The availability of bankruptcy protection in the United States Bankruptcy Court and sources of information about bankruptcy law, such as [upsolve.org](http://upsolve.org).
- Information about debt buying, the extent of discounting of the original debt at the time of a debt sale and the debtor's ability to bargain with the debt buyer about the amount that s/he will pay as well as the details of a payment plan.
- The consequences of consenting to the entry of a default judgment for the full amount of the outstanding balance if there is a default in complying with the payment plan and steps that the debtor could take to request forgiveness of a payment or payments and circumstances that might warrant it.

Here is the extent of education that the New Mexico ODR application, provided by a national vendor, provides to the debtor. It consists of one screen that reads as follows:

I do not want to try and settle this case without going to court because

- I don't owe this money
- The debt was discharged in bankruptcy
- The debt is too old to collect pursuant to law (time barred)
- Another reason not listed above

If self-represented debtors have the option to participate in an online process that gives them so little help in understanding their situation and participating knowledgeably in a real negotiation process, it is no surprise that these sorts of ODR applications are experiencing low levels of use around the country.

Other desirable features of an ODR process for SRLs are as follows:

- Making a facilitator, mediator or other neutral (such as self-help staff member) available to explain matters to the parties (or one party) and to help with the negotiation. This is a feature of the Utah small claims ODR pilot. Facilitators are volunteers, including court staff members, who agree to provide this sort of help. In the Clark County, Nevada custody dispute ODR process, the parties can ask one of the court's custody mediators – the staff who will conduct a mediation at the courthouse if the parties do not reach agreement through ODR – to participate in the online process
- Displaying on the ODR app a phone icon for reaching the self-help centre
- Incorporating a chat feature for reaching a self-help centre staff person for the answer to a user's question
- Linking to videos, website information and other self-help centre resources

What is the role of ODR in addressing the larger 'justice gap' issue? If a person were aware of the availability of an ODR process for resolving an issue they are experiencing, and that process were free or inexpensive, they might use it. But

since most Americans are not aware that they have a legal issue, a court-based ODR application would be of no use to them. They would never go to a courthouse or look on a court website and would remain unaware of the availability of the resource. They would be very unlikely to file a lawsuit for the purpose of accessing such a process.

On the other hand, if an ODR process were available as a stand-alone resource or even as a pre-filing court application, it could be treated as any other resource within a 'legal portal' environment. If the portal were to determine that a user had a legal issue to which an ODR application was applicable, it could present ODR as an available option for the user's consideration. A user might find it to be an attractive option – postponing or avoiding court involvement but taking a proactive step to resolve a troublesome matter. If the user chose to engage it, the portal could link the user seamlessly to the application to initiate a session by inviting the other side to participate. In this environment, ODR participation could never be mandatory because no entity with coercive power would be involved.

But the ODR application could be linked to any number of other legal dispute resolving processes, such as private mediators or arbitrators, if the users were unsuccessful in reaching a resolution. It could be linked to an attorney referral service if one of the users wished to litigate. It could also be linked directly to the court with jurisdiction over the sort of dispute that did not resolve, giving either or both parties the opportunity to bring the unresolved dispute to the court's attention, submitting to the court's jurisdiction, waiving service of process and notice of the proceeding, and, if they both agree, to submit the record of their negotiations to the court either as useful background for additional presentations or as the complete record on which the court would be asked to make its decision. Of course, the court would retain the power to schedule a hearing and to request additional documentation and/or testimony. But it is altogether possible that many matters could be resolved on such a stipulated record.

Only actual experience will show the extent to which the public would choose to take advantage of this sort of online service as a true alternative to the traditional court process and as a new resource for addressing the 'justice gap'. That experience would also show whether the public would be willing to pay a fee for such a service. Of course, ODR vendors or courts would have to offer such services – in a 'legal portal' environment or as an entrepreneurial venture – in order to gain such experience.

#### **4 Final Considerations**

ODR applications are still in their infancy. Many of the early ODR products were used in specialized settings, such as the online resolution of traffic tickets in which the prosecutor or law enforcement agency had a substantial motive to participate to avoid a court appearance and the cited person had the same court avoidance incentive plus the possibility of negotiating a reduced fine. There were minimal possibilities for negative unintended consequences. For resolution of

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more 'mainstream' civil conflicts, it is important to realize that every new pilot programme is a true experiment and an experiment involving justice. In addition, as these projects move from pilots to a permanent part of the justice ecosystem, they will need to comply with all disability and language access legal obligations.

I urge every court and vendor to perform a maximum amount of user testing, in both controlled and real environments, before live piloting any new programme. Resolution of a debt collection, landlord/tenant, child custody, child support or foreclosure matter has real and permanent consequences for the persons involved. Every effort needs to be made before users' lives are affected permanently to ensure that a new technology performs in the way in which it is intended, without unintended or unimagined ancillary effects or impacts.